

STATE OF MICHIGAN  
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals  
Judges: Karen M. Fort Hood, Richard Allen Griffin, and Pat M. Donofrio

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THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

vs

Supreme Court No. 128376

DARRYL PEALS,

Defendant-Appellant.

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Court of Appeals No. 251406  
Third Circuit Court No. 02-3303

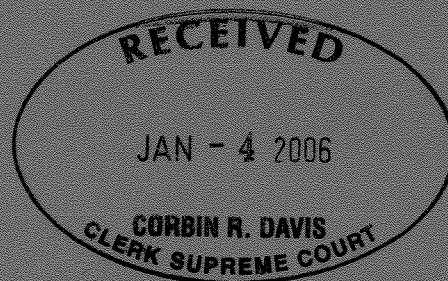
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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED

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## COUNTERSTATEMENT OF JURISDICTION

The People accept and adopt defendant's statement of jurisdiction. The Michigan Supreme Court has jurisdiction over this appeal by leave through MCR 7.301(A).

## COUNTERSTATEMENT OF QUESTION PRESENTED

### I.

**A handgun, even if currently inoperable, is a "firearm" for purposes of the Felon in Possession and Felony Firearm statutes because it was designed to and may expel a dangerous projectile. Here, defendant possessed a handgun that was designed to and could be repaired so that it may fire a dangerous projectile. Did defendant possess a firearm?**

The People answer: "YES."

Defendant answers: "NO."

The trial court answered: "YES."

The Court of Appeals answered: "YES."

## COUNTERSTATEMENT OF FACTS

On February 19, 2002, at approximately 12:15 p.m., P.O. Charo Turner and P.O. Camela Walker were on patrol in the area of East Forest and Grandy in Detroit. Turner observed a car, with three occupants, fail to signal when making a left turn onto Grandy. (1b)<sup>1</sup> Turner initiated a traffic stop. While approaching the vehicle, Walker saw the rear passenger, defendant, Darryl Peals, holding a crack pipe in his hand. (5b) Turner asked the occupants of the car if they had any weapons or contraband. Defendant indicated that he had a gun in his pocket that he had found. (4b) Defendant indicated that the gun was broken and did not work. (8b) Walker retrieved the weapon from defendant's pocket and arrested him. Walker noticed that the gun did not have an ammunition clip and was damaged. (8b) When the safety was released from the gun, the entire slide fell off. (9b) The gun was forwarded to the Detroit Crime Lab for ballistic testing. The testing confirmed that the gun was a 380 caliber semi-automatic handgun. (15a) The gun did not function due to its damage. The firing pin assembly was missing entirely. (16a) The top portion of the slide was cracked and missing. (17a) In its current condition, the gun could not fire a round. (22a) If the firing pin and springs were replaced, the gun could possibly fire one round but, because the gun was missing an ejector stop, the firing would cause the slide to forcefully eject directly off and behind the gun to prevent a second shot. (23a)

Later that evening, Inv. William Jackson informed defendant of his constitutional rights and asked him if he wished to make a statement. Defendant waived his rights and told Jackson that he found the gun in the area of Hancock and Dubuis in Detroit about 20 minutes prior to his

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<sup>1</sup>References to the trial record will be cited by the page the reference appears in the Plaintiff-Appellee's and Defendant-Appellant's Appendices.

arrest. He saw that it was a gun and examined it. Defendant saw that the gun was damaged, had no ammunition clip, and was missing a firing pin. (13b) Defendant decided to keep the gun to sell as scrap metal.

On April 19, 2002, a plea hearing commenced in the Third Circuit Court for Wayne County, the Honorable Craig S. Strong presiding. The criminal information charged defendant with one count of Carrying a Concealed Weapon, one count of Felon in Possession of a Firearm, and one count of Felony Firearm. The People filed a notice to enhance any sentence as a Habitual Fourth Offense. In exchange for the People dismissing the CCW count and the notice to enhance, defendant entered a guilty plea to one count of Felon in Possession of a Firearm and one count of Felony Firearm. The parties also agreed to a reduced sentence on the Felon in Possession charge. On May 7, 2002, Judge Strong sentenced defendant to a mandatory term of 2 years incarceration for the Felony Firearm charge. The court further suspended defendant's sentence for Felon in Possession.

Defendant later moved to withdraw his guilty plea. Defendant contended that the plea agreement was illusory because the People would not have been able to factually prove the CCW charge. Defendant contended that the gun was inoperable and therefore could not be considered a firearm under the CCW statute. On July 1, 2003, with the People's agreement, Judge Strong granted defendant's motion.

On September 8, 2003, a jury trial commenced in the Third Circuit Court for Wayne County, the Honorable Craig S. Strong presiding. The criminal information charged defendant with one count of Felon in Possession of a Firearm and one count of Felony Firearm. Defendant claimed that the gun was so badly damaged that it did not qualify as a firearm under either of the



charged offenses. On September 9, 2003, the jury convicted defendant as charged. On September 24, 2003, Judge Strong sentenced defendant to a term of one year probation for the Felon in Possession charge. That probation would start at the completion of the mandatory 2 year term of incarceration required for the Felony Firearm conviction.

Defendant appealed his conviction to the Court of Appeals, as of right. Defendant claimed on appeal that the handgun was permanently inoperable and did not constitute a “firearm” under MCL 750.224f or 750.227b. Defendant also claimed that his trial counsel was ineffective for failing to request a jury instruction on the defense of inoperability. On February 15, 2005, the Court found that inoperability is not a defense to either Felony Firearm or Felon in Possession. Because the handgun could have been made capable of firing one shot, it constituted a “firearm” under the statutes. Additionally, because the handgun was capable of being made to fire a shot, there was no grounds for a request for the inoperability instruction. The Court affirmed defendant’s conviction.

Defendant now appeals to this Supreme Court on leave granted. Defendant again claims that the handgun fails to meet the definition of a “firearm” for purposes of the Felony Firearm and Felon in Possession offenses.

## ARGUMENT

### I.

**A handgun, even if currently inoperable, is a “firearm” for purposes of the Felon in Possession and Felony Firearm statutes because it was designed to and may expel a dangerous projectile. Here, defendant possessed a handgun that was designed to and could be repaired so that it may fire a dangerous projectile. Defendant possessed a firearm.**

#### **Standard of review**

Whether defendant’s handgun falls within the statutory definition of a firearm involves a question of law reviewed de novo.<sup>2</sup>

#### **Discussion**

Defendant claims that the handgun he possessed was not a firearm under the Felon in Possession and Felony Firearm statutes. Defendant asserts that the gun was so badly damaged that it could not be readily repaired to render it capable of firing a bullet. Because the gun could not fire, it could not be considered a firearm under the statutory definition of the term. The Court of Appeals determined that the handgun’s current operability was not an element of the charged offenses. Because the handgun could have been repaired to make it capable of firing a shot, the handgun met the statutory definition of a “firearm.”

For purposes of the Firearms chapter of the Michigan Penal Code, which includes the offenses of Felony Firearm, Felon in Possession, and Carrying a Concealed Weapon among others, a “firearm” is defined as:

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<sup>2</sup>*People v. Grayer*, 235 Mich App 737, 739 (1999); *People v. Nimeth*, 236 Mich App 616, 620 (1999); *People v. Schaefer*, 473 Mich 418, 427 (2005).

a weapon from which a dangerous projectile *may* be propelled by an explosive, or by gas or air. Firearm does not include a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber.<sup>3</sup>

The Michigan Legislature has not defined “firearm” with clear language either including or excluding guns that are presently unable to fire a projectile.<sup>4</sup> The absence of clear language has required the appellate courts of this state to interpret the statutory language to determine whether the Legislature intended to include currently inoperable handguns under the definition of “firearm.” The result has been a conflict in the way the term is defined in regards to the various offenses contained in the firearms chapter.<sup>5</sup> Applying a strict construction of the statutory language, courts have found that a firearm must be operable to constitute a pistol under the concealed weapons statute.<sup>6</sup> The courts held that a pistol must be “capable of propelling the requisite sized dangerous projectile or of being altered to do so within a reasonably short time.”<sup>7</sup> A defendant may make a successful affirmative defense against a charge of carrying a Concealed

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<sup>3</sup>MCL 750.222(d) (emphasis supplied).

<sup>4</sup>The Legislature used such clear language when defining a “dangerous weapon” under MCL 750.110a to include a “loaded or unloaded firearm, whether operable or inoperable.” Many states have statutes which have similar clear language explicitly stating that a “firearm” can be inoperable. See, e.g. Delaware: 11 Del.C. § 222; Hawai’i: HRS § 134-6(a); Nevada: NRS 202.360(3)(b); Maryland: Md. Code §4-204(a); California: Calif. Penal Code § 12022.53, subd. (b). A weapon from which a dangerous projectile “*may* be propelled” does not, on its face, exclude weapons in need of some repair.

<sup>5</sup>See, *People v. Parr*, 197 Mich App 41, 46-47 (1992)(Corrigan,J. concurring).

<sup>6</sup>*People v. Gardner*, 194 Mich App 652, 654 (1992); *People v. Huizenga*, 176 Mich App 800, 804 (1989).

<sup>7</sup>*Gardner*, *supra*.

Weapon with proof that the pistol “would not fire and could not readily be made to fire”<sup>8</sup> or that the gun was “totally inoperable” and could not be readily repaired.<sup>9</sup> In contrast, the same courts have unequivocally held that operability is not and has never been an element of either Felony Firearm<sup>10</sup> or Felon in Possession.<sup>11</sup> The Court of Appeals has held that, if a gun is designed to expel a dangerous projectile, and could do so but for the fact that the gun was unloaded, damaged, or missing essential parts, it qualifies as a firearm.<sup>12</sup> Adding to the mix is this Court’s interpretation of “firearm” as it relates to the offense of Possession of a Short-Barreled Shotgun.<sup>13</sup> The Court held that “temporarily inoperable firearms which can be made operable within a reasonable time fall within the purview of the statutes that govern the use and possession of firearms.”<sup>14</sup>

The statutory definition of “firearm” in MCL 750.222(d) should be interpreted consistently for all offenses listed in the Firearms chapter of the Penal Code. The firearm statutes necessitate the same statutory construction.<sup>15</sup> Reviewing courts resolve disputed interpretations

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<sup>8</sup>*Id.*

<sup>9</sup>*People v. Hill*, 433 Mich 464, 476 (1989).

<sup>10</sup>*People v. Thompson*, 189 Mich App 85, 86 (1991).

<sup>11</sup>*People v. Brown*, 249 Mich App 382, 384 (2002).

<sup>12</sup>*Id.*

<sup>13</sup>*Hill*, *supra*.

<sup>14</sup>*Id.* at 477. The Court expressly limited its interpretation to only MCL 750.224b and refused to extend it to the concealed weapon statute or the felony-firearm statute.

<sup>15</sup>*Id.* at 475; *Parr*, *supra* at 47.

of statutory language by effectuating the legislative intent.<sup>16</sup> The plain language of the statute should be read as a whole to determine and give effect to the Legislature's intent.<sup>17</sup> When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. The words of the statute must be given their plain and ordinary meaning. Only when the statutory language is ambiguous may a court look outside the statute to ascertain the Legislature's intent. The Legislature's intent must be ascertained from the actual text of the statute, not from extra-textual judicial divinations of "what the Legislature really meant."<sup>18</sup> When a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined.<sup>19</sup> Provisions of the Michigan Penal Code, such as MCL 750.222, shall not be strictly construed and instead must be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.<sup>20</sup> Interpretation of a penal statute requires consideration of the evil sought to be corrected.<sup>21</sup>

Statutes making it unlawful to have or carry weapons are designed to suppress the act or practice of going armed and being ready for offense or defense in case of conflict with another and to outlaw instruments ordinarily used for criminal and improper purposes . . .

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<sup>16</sup>*People v. Valentin*, 457 Mich 1, 5 (1998).

<sup>17</sup>*People v. Morey*, 461 Mich 325, 330 (1999).

<sup>18</sup>*Schaefer*, supra at 432, quoting *Lansing Mayor v. Pub. Service Comm.*, 470 Mich 154, 164 (2004).

<sup>19</sup>*People v. Schultz*, 246 Mich App 695, 703 (2001).

<sup>20</sup>MCL 750.2; *People v. Denio*, 454 Mich 691, 699 (1997).

<sup>21</sup>*People v. Goolsby*, 284 Mich 375, 379 (1938).

The statutes should receive a reasonable construction in accord with the purpose of the legislature and in the light of the evil to be remedied, and they should be construed with the thought in mind that they are aimed at persons of criminal instincts and for the prevention of crime . . . .<sup>22</sup>

The conflicting interpretations of the term “firearm” share many similar aspects. All interpretations hold that operability is not an element the prosecution is required to establish as part of its prima facie case or to survive a request for a directed verdict.<sup>23</sup> The interpretations are also consistent that, where defendant raises the issue of whether a particular weapon is operable “and, as such a ‘firearm’ under the statute, the prosecution may have to present evidence on operability to convince the trier of fact that an operable ‘firearm’ was actually present.”<sup>24</sup> The interpretations are also consistent in that a gun that was inoperable at the time of the offense can still be a “firearm.” Where the interpretations diverge is in regards to the ease and quickness in which a gun can be made ready to fire a projectile. The *Gardner/Huizenga* interpretation requires that the gun be “readily” capable of firing within a “reasonably short” period of time. *Hill* requires that the gun be capable of firing within a reasonable time. The *Thompson/Brown* interpretation, while hinting that the gun must be able to fire at some point in time, does not set out a time limit for when the gun must be repaired.

The appellate courts’ interpretation of “firearm” in regards to the Felon in Possession and Felony Firearm statutes most closely follows the language of the statute. The *Gardner/Huizenga*

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<sup>22</sup>*Hill*, supra at 473, quoting 94 CJS, Weapons, § 2, pp. 479-480.

<sup>23</sup>The appellate courts have consistently found that to require prima facie proof of operability would prevent prosecution in cases where the weapon is not recovered even though testimony supports its existence. See, *People v. Mason*, 96 Mich App 47, 51 (1980).

<sup>24</sup>*People v. Brooks*, 135 Mich App 193, 197 (1984).

interpretation is based on an analysis of the definition of “firearm” contained in MCL 8.3t, not MCL 750.222(d). The definition of “firearm” in MCL 750.222 was not added until 1992 and did not apply in either *Gardner* or *Huizenga*. Although the language of MCL 8.3t<sup>25</sup> is very similar to the language of MCL 750.222(d), the former statute is not a part of the Penal Code. The *Gardner* and *Huizenga* Courts applied a strict construction of the statutory language in MCL 8.3t reading it in a manner most favorable to the accused. Because MCL 750.2 requires a less strict construction of MCL 750.222(d), the “broad” construction employed in *Hill*, *Thompson*, and *Brown* is most appropriate. MCL 750.222(d), similarly to the *Thompson/Brown* interpretation, does not contain a time limit or a level of ease for when or how a gun can be made capable of firing a dangerous projectile. This Court should not read any such limits into the statutory language. MCL 750.222(d) indicates that a weapon from which a dangerous projectile “may be” propelled by an explosion, gas, or air, is a firearm. The statutory term “may” is permissive, as opposed to the term “shall,” which carries a mandatory nondiscretionary connotation.<sup>26</sup> The statutory language indicates that the weapon does not need to be operable at the time of the offense, that is, it does not have to be a weapon that “shall” or “must” be able to propel a projectile. A firearm is simply a weapon that “may be” able to fire a projectile. When that propulsion must occur or what needs to be done to make the weapon capable of the propulsion is not addressed by the statute. Reading the statute in its plainest terms, any weapon

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<sup>25</sup>“The word ‘firearm’, except as otherwise specifically defined in the statutes, shall be construed to include any weapon from which a dangerous projectile may be propelled by using explosives, gas or air as a means of propulsion, except any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB’s not exceeding .177 calibre by means of spring, gas or air.”

<sup>26</sup>*Brown*, supra at 386; *People v. Seeburger*, 225 Mich App 385, 392 (1997).

that currently is capable or may be capable at some time of firing a projectile, either through loading ammunition or making mechanical repairs, is a firearm. The statutory language does not require that the loading of ammunition or the necessary repairs be made quickly and easily, only that they may be made.

This interpretation furthers the intent of the Legislature. The Legislature's intent in creating the statutes contained in the Firearms chapter of the Penal Code was to prevent armed conflict and outlaw instruments ordinarily used for criminal and improper purposes.<sup>27</sup> Both the Felony Firearm and Carrying a Concealed Weapon statutes were constructed with the intent of discouraging the practice of carrying a gun in circumstances where harm is apt to occur.<sup>28</sup> In the case of Carrying a Concealed Weapon that danger of harm radiates not only from the defendant's possible use of an operable firearm but from the defensive reaction of others to the weapon regardless of whether the firearm was operable or inoperable.<sup>29</sup> "[T]he display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue."<sup>30</sup> For Felony Firearm, the legislative intent was to discourage carrying guns, whether operable or not, and to protect victims of crime, who presumably are not less frightened if the gun just happens to be inoperable.<sup>31</sup> The Felon in Possession statute indicates

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<sup>27</sup>*Hill*, supra at 473.

<sup>28</sup>*Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich 374 (1979); *People v. Jackson*, 108 Mich App 346, 350 (1981); *People v. Bailey*, 10 Mich App 636, 639 (1968).

<sup>29</sup>*Huizenga*, supra at 802-803;

<sup>30</sup>*McLaughlin v. United States*, 476 US 16, 17-18, 106 S Ct 1677, 90 L Ed 2d 15 (1986).

<sup>31</sup>*Brooks*, supra at 197; *People v. Pierce*, 119 Mich App 780, 782-783 (1982);



the Legislature's intent to "keep any and all handguns out of the hands of convicted felons" regardless of their operability.<sup>32</sup> That the weapon cannot currently fire does not mean that a felon does not have access to a prohibited weapon or that harm is not apt to occur to the defendant or others. The defendant, if willing to put in the time and the investment no matter how small or large, can make the weapon functional. It would be contrary to the legislative intent to allow criminals to avoid prosecution under the Firearms chapter simply by removing the bullets or a few crucial parts from a weapon.<sup>33</sup> The clear intent of the legislature was to limit people from carrying a firearm and bar felons entirely from access to firearms. The Legislature was mindful of a person's criminal instincts and crafted the firearms statutes to prevent the crimes possible when a criminal has access to a functional firearm.<sup>34</sup> Whether it takes a few minutes to load the weapon or a few weeks to repair mechanical problems, a person in possession of an inoperable weapon has the ability to possess a functional firearm. It is this access to a firearm, and the possible harm and criminality associated with the firearm, that the legislature intended to discourage.

This interpretation of MCL 750.222(d) would not result in every weapon, no matter its construction or disrepair, constituting a "firearm." Certain weapons are totally and permanently inoperable. "Common sense and experience leave no room for doubt that an instrument originally designed, made, and intended to expel a projectile by force of an explosion can lose

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<sup>32</sup>*Brown*, supra at 386.

<sup>33</sup>*Brown*, supra; *Hill*, supra at 479.

<sup>34</sup>*Hill*, supra.

this characteristic in many ways such that it would no longer be fairly considered a firearm.”<sup>35</sup>

However, the circumstances causing the inoperability should be exceptional and not just a simply showing of disrepair.<sup>36</sup> The final determination of whether a weapon “may be” capable of firing a dangerous projectile and therefore is a “firearm” is a fact question that will be decided by the jury or trial judge. A defendant would still have the ability to challenge whether the handgun is a “firearm” and the prosecution may still need to present evidence to convince the trier of fact that the gun was repairable. Further, the defendant would still have the option of requesting CJI2d 11.6 which informs the jury that, “It is not against the law to carry a gun that is so [out of repair / taken apart with parts missing / welded together / plugged up] that it is totally unusable as a firearm and cannot be easily made operable.”<sup>37</sup> Interpreting the statute in its plain terms to include all weapons that may be capable of firing the requisite dangerous projectile under the definition of “firearm” accurately tracks the legislative intent without overreaching.

The handgun at issue in this case constitutes a firearm under MCL 750.222(d) because it may fire a dangerous projectile. In reviewing the sufficiency of the evidence, the Court views the evidence presented in a light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable

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<sup>35</sup>*Armstrong v. Commonwealth*, 562 SE2d 139, 145 n. 6 (Va., 2001). Examples of which would be a gun with a barrel filled with lead or guns modified by drilling barrels and filling them with metal pins or rods. See, *United States v. Rivera*, 415 F3d 284 , 287 (CA 2, 2005).

<sup>36</sup>*Id.* at 146; *Kingspur v. Commonwealth*, 593 SE2d 208, 210 (Va., 2004)(finding that a handgun that could not be test fired, did not function, was missing parts, and came apart when picked up was still a firearm).

<sup>37</sup>The People would note that this instruction would need amending because it requires the inoperable gun to be “easily made operable” in order to qualify as a “firearm.” The language of MCL 750.222(d) imposes no such requirement.

doubt.<sup>38</sup> There is no dispute that the handgun, in its current condition, was inoperable. The gun was missing the firing pin assembly which is essential to causing the requisite explosion for firing a bullet. (17a) The top of the slide was cracked and the ejector stop was missing. The condition of the gun prevented it from properly chambering a round, and even if it could, there was no means to fire that round. (22a) But, the expert indicated that the handgun, after certain repairs were made, could fire. The ballistics expert testified that defendant's handgun could be made to fire one round if the firing pin assembly was replaced. (23a) The expert qualified his testimony by saying that, without a proper ejector stop, the gun would be unable to fire another round and that firing the first round would put the shooter in danger because the slide would forcefully eject directly at the shooter. But, the statute does not require that the gun be able to fire successive shots only that it may expel "a dangerous projectile." Because defendant could reasonably make the handgun functional to fire one shot, he was in possession of a "firearm" in violation of both the Felon in Possession and Felony Firearm statutes. This Court should affirm defendant's conviction.

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<sup>38</sup>*People v. Nowack*, 462 Mich 392, 399 (2000).

**RELIEF**

**WHEREFORE**, the People respectfully request this Honorable Court to affirm defendant's conviction.

Respectfully submitted,

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